

1990

Salt Lake City v. Wilford Lynn McCullough : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

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DOCKET NO.

900100-CA

IN THE UTAH COURT OF APPEALS

SALT LAKE CITY,

Plaintiff and Respondent

vs.

WILFORD LYNN McCULLOUGH,

Defendant and Appellant

Case No. 900100-CA

Priority 2.0

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD CIRCUIT COURT,
SALT LAKE DEPARTMENT, SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE PAUL GRANT PRESIDING.

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FILED

MAY 1 1990

COURT OF APPEALS

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Plaintiff and Respondent)	Case No.900100-CA
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	(ii)
JURISDICTION OF THE COURT	1
NATURE OF THE PROCEEDINGS	1
ISSUE PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENTS	4
ARGUMENT	5
CONCLUSION	10

TABLE OF AUTHORITIES

PAGE

CASES CITED

<u>Coolidge v. New Hampshire</u> , 403 U.S. 443 (1971)	6
<u>Sandy City v. Thorsness</u> , 778 P.2d 1011 (Utah App. 1989)	3
<u>State v. Baird</u> , 763 P.2d 1214 (Utah App. 1988)	8
<u>Stave v. Baumgaertel</u> , 762 P.2d 2 (Utah App. 1988)	7
<u>State v. Holmes</u> , 774 P.2d 506 (Utah App. 1989)	8
<u>State v. Peck</u> , 329 N.W.2d 680 (Iowa 1982)	8
<u>State v. Sierra</u> , 754 P.2d 972, 975 (Utah App. 1988)	7
<u>State v. Sevy</u> , 758 P.2d 935 (Utah App. 1987)	3
<u>State v. Trujillo</u> , 739 P.2d 85 (Utah App. 1987)	7
<u>United States v. Cortez</u> , 449 U.S. 411, 417 (1980)	6

STATUTES CITED

Utah Code Ann. Section 41-6-24 (2)	2
Utah Code Ann. Section 77-7-15	6

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourth Amendment	5
Utah Constitution Article 1, Section 14	5

IN THE UTAH COURT OF APPEALS

SALT LAKE CITY,

Plaintiff and Respondent,)

VS.

WILFORD LYNN McCULLOUGH,

Defendant and Appellant.)

Case No. 900100-CA

Priority 2.0

BRIEF OF APPELLANT

APPEAL FROM THE **JUDGMENT** OF THE THIRD CIRCUIT COURT,
SALT LAKE DEPARTMENT, SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE PAUL GRANT PRESIDING.

JURISDICTION OF THE COURT

This court has jurisdiction pursuant to Rules 3(a) and 4(a) of the Rules of the Utah Court of Appeals and Section 77-35-26 (2)(a) (repeal effective July 1990) of the Utah Code Annotated and Section 78-2a-3 of the Utah Code Annotated.

NATURE OF THE PROCEEDINGS

Wilford McCullough appeals from an Order denying his Motion to Suppress the presentation of evidence obtained

subsequent to an investigatory stop. Upon stipulation of the prosecutor, a conditional plea was entered in the Third Circuit Court after the Honorable Judge Paul Grant respectfully denied Defendant's Motion. The prosecution agreed to the conditional plea with the understanding that the right to appeal Judge Grant's denial of the Motion to Suppress was reserved.

ISSUE PRESENTED FOR REVIEW ON APPEAL

Did the arresting officer have specific articulable facts known to him at the time he stopped defendant's vehicle such that a reasonable person would conclude the defendant had committed or was about to commit a crime?

DETERMINATIVE CONSTITUTIONAL PROVISIONS OR STATUTES

United States Constitution Fourth Amendment.

Utah Constitution Article 1, Section 14.

Utah Code Annotated Section 77-7-15.

Utah Code Annotated Section 41-6-24 (2).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Defendant appeals from a criminal conviction in the

Circuit Court. The conviction was based upon a stipulated conditional plea of guilty.

II. COURSE OF PROCEEDINGS

The Circuit Court denied defendant's Motion to Suppress after an evidentiary hearing, which was held prior to trial on December 29, 1989. The parties then stipulated defendant could enter a conditional plea of guilty and preserve his rights to appeal. The Findings of Fact and Conclusions of Law and the Order Denying Defendant's Motion to Suppress and Judgment of Conviction and Sentence was entered on February 1, 1990. Defendant filed his Notice of Appeal on February 12, 1990.

III. DISPOSITION AT TRIAL COURT

Defendant was convicted of driving while under the influence of alcohol and operating a motor vehicle without a valid license after entering a conditional guilty plea. The plea was conditional in order to preserve his right to appeal challenging the Court's denial of his pretrial Motion to Suppress all evidence due to an illegal traffic stop. See, Sandy City v. Thorsness, 778 P.2d 1011, 1012 (Utah App. 1989) (citing State v. Sevy, 758 P.2d 935, 939 (Utah App. 1987)).

The Court made specific findings concerning the conditional plea.

IV. STATEMENT OF FACTS

On October 27, 1989, a Salt Lake City police officer pulled up next to Defendant's vehicle on 200 West and 900 South while the light was red. (See Trial Transcript, page 6, hereafter T.6). When the light changed to green, the Defendant's car did not move for approximately thirty (30) seconds and then proceeded to go through the light. (T.6) The officer stopped the vehicle and parked behind it. (T.6) The stop was not based on any sort of driving pattern or other conduct. (T.11)

After the officer stopped the vehicle, the officer approached the Defendant's vehicle, which moved in reverse toward the officer's vehicle and then abruptly stopped. (T.18) The Defendant was subsequently arrested for driving under the influence of alcohol and driving without an operator's permit.

SUMMARY OF ARGUMENT

The police officer's stop of Defendant was a "seizure" subject to the Fourth Amendment of the United States

Constitution. An investigatory stop can be justified only upon a showing of a reasonable and articulable suspicion that Mr. McCullough had committed or was committing a crime or that he was stopped incident to a traffic offense. The officer could not reasonably suspect from the facts apparent to the officer at the time of the stop and from reasonable inferences drawn from those facts that Mr. McCullough was driving while intoxicated. The mere fact that the vehicle remained stopped at a traffic signal for 30 seconds after it turned green did not provide sufficient reasonable suspicion to seize Mr. McCullough. As there were no objective facts upon which the officer could base a reasonable suspicion that Mr. McCullough was driving while intoxicated at the time of the stop, the investigatory stop was illegal and any evidence derived therefrom should have been suppressed pursuant to Mr. McCullough's pretrial Motion.

ARGUMENT

OBJECTIVE FACTS APPARENT TO THE OFFICER
WERE INSUFFICIENT TO REASONABLY SUSPECT
THAT THE DEFENDANT WAS INTOXICATED AT THE
TIME OF THE INVESTIGATORY STOP.

Both the Fourth Amendment to the United States
Constitution and Article 1, Section 14 of the Utah

Constitution provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....

The police officer's stop of the Defendant was a "seizure" subject to the Fourth Amendment of the United States Constitution and to Article 1, Section 14 of the Utah Constitution and absent certain limited exceptions to the warrant requirement, a warrantless seizure is presumptively unreasonable. See, Coolidge v. New Hampshire, 403 U.S. 443 (1971).

In United States v. Cortez, 449 U.S. 411, 417 (1980), the United States Supreme Court stated:

The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of the vehicle here. Reid v. Georgia, 448 U.S. 438, 440 (1980); Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1, 16-19 (1968). An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. Brown v. Texas, 443, U.S. 47, 51 (1979); Delaware v. Prouse, 440 U.S. 648, 661 (1979); United States v. Brignoni-Ponce, supra, at 884; Adams v. Williams, 407 U.S. 143, 146-149 (1972); Terry v. Ohio, supra, at 16-19.

The standard for investigatory stops is codified in Utah Code Annotated Section 77-7-15:

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing a public offense.... (emphasis added)

Thus, an investigatory stop can be justified only upon a showing of reasonable suspicion that the Defendant had committed or was committing a crime or that he was stopped incident to a traffic offense. State v. Sierra, 754 P.2 972, 975 (Utah App. 1988).

Hence, both the Legislature and the Courts adhere to the standard that an officer must have a reasonable suspicion to believe an individual has committed or is in the act of committing a crime. The reasonable suspicion must be articulable, meaning the officer must be able to explain the reasonable suspicion to others. In State v. Baumgaertel, 762 P.2d 2, 4 (Utah App. 1988) (citing State v. Trujillo, 739 P.2d 85, 88 (Utah App. 1987)), this court stated:

To justify an "investigatory stop" or "seizure" that falls short of an official arrest, a peace officer "must point to specific, articulable facts which, together with rational inferences drawn from those facts, would lead a reasonable person to conclude (the suspect) had committed or was about to commit a crime.

Reasonable suspicion that a Defendant was intoxicated must be based upon facts apparent to the officer and reasonable inferences drawn therefrom for the officer to

reasonably suspect intoxication. Sandy City v. Thorsness, 778 P.2d 1011, 1012 (Utah App. 1989) (citing State v. Baird, 763 P.2d 1214, 1216 (Utah App. 1988)). Reasonable suspicion must be based upon articulated, "objective facts" apparent to the officer at the time of the stop. Thorsness, at 1012. (Cf. State v. Holmes, 774 P.2d 506 (Utah App. 1989). Therefore, the test for an investigatory stop is based "not on the policeman's subjective theory, but whether the record discloses articulable objective facts were available to the officer to justify the stop." State v. Peck, 329 N.W.2d 680, 686 (Iowa 1982).

The case of Sandy City v. Thorsness, 778 P.2d 1011 (Utah App. 1989) is on point. In that case, a Sandy City police officer stopped an individual because it was late at night, 1:30 a.m., the Defendant drove slowly in the inside lane and stopped alongside the officer's car failing to immediately move on when signaled to do so by the officer. This Court found that while the conduct may be indicative of a drunken driver when combined with other factors, such behavior was equally consistent with the habits and conduct of a normal driver. Thorsness at 1012.

The officer in this case indicated that the only act of Mr. McCullough, observed by the officer prior to the stop,

pertained to Mr. McCullough's not moving through the green light for thirty (30) seconds after it had changed to a green light. (T.17) Under Utah Law pertaining to traffic and control signals, vehicular traffic facing a green signal may proceed:

"(2) "Green" indicates:

(a) Vehicular traffic facing a circular green signal may proceed straight through or turn right or left unless a sign at that place prohibits either turn...."
U.C.A. Section 41-6-24 (2) (emphasis added).

Defendant was not committing a traffic offense by not proceeding through the green light immediately. Such behavior is as equally consistent with the habits and conduct of a normal driver momentarily distracted as it is with that of a driver who is violating the law.

The officer indicated in his testimony that he did not base the stop on any sort of driving pattern or any other conduct observed. (T.11) The officer also indicated that after he had made the stop, Defendant's vehicle rolled back toward the officer's vehicle. (T.18) The officer admitted in testimony that the vehicle could have reversed due to mechanical difficulties. (T.19)

The Defendant in this case was stopped solely on the basis of the fact that he did not proceed through the

green light for thirty (30) seconds after it had changed from red.

Defendant's prolonged stop at the traffic light did not indicate a reckless, erratic driving pattern indicating a lack of vehicular control (T.11) nor did it violate Utah Law regarding traffic control signals. The facts of this case are equally indicative of innocent behavior and without objective facts creating a reasonable suspicion, do not provide a reasonable basis to suspect Defendant was intoxicated. No evidence exists for a reasonable suspicion based upon articulated, "objective facts". Therefore, the police officer's stop of Mr. McCullough was a "seizure" subject to the Fourth Amendment of the United States Constitution and Article 1, Section 14 of the Utah Constitution and without reasonable suspicion, as articulated in Terry and Utah case law, subsequent evidence resulting in conviction should have been suppressed.

CONCLUSION

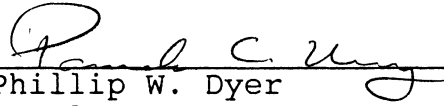
Based upon the foregoing, Defendant respectfully requests that the Trial Court's conviction of Defendant after the denial of Defendant's Motion to Suppress Evidence pursuant to the traffic stop be reversed. Evidence obtained

subsequent to the unlawful seizure should be suppressed and excluded and the case remanded to the trial court for appropriate disposition.

Dated this 27 day of April, 1990.

Respectfully submitted,

LAW OFFICE OF PHILLIP W. DYER
& ASSOCIATES



Phillip W. Dyer
Pamela C. Urry
Attorney for Defendant/Appellant

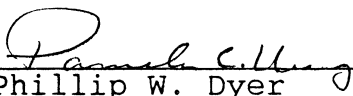
CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, two (2) true and correct copies of the foregoing Brief of Appellant to the following party on the 27th day of April, 1990.

Glen Cook
Salt Lake City Prosecutor's Office
451 South 200 East
Salt Lake City, Utah 84111

DATED this 27 day of April, 1990.

LAW OFFICE OF PHILLIP W. DYER
AND ASSOCIATES


Phillip W. Dyer
Pamela C. Urry
Attorneys for
Defendant/Appellant

MI/B:McCullough.bri/PWD1

(WILLIAMS - Direct by Cook)

1 A. West patrol division.

2 Q. Fine. Was your attention directed toward a
3 Chevy truck, 1973, blue over white?

4 A. Yes, it was.

5 Q. What first attracted your attention to that
6 vehicle?

7 A. I don't -- I pulled up next to it, I believe
8 it was 200 West and 900 South, and --

9 Q. And --

10 A. -- the light --

11 Q. -- what color was the light at that time?

12 A. The light was red at that time.

13 Q. Okay. Did the light change to green?

14 A. Yes, it did.

15 Q. Okay. What did the other car do when the light
16 changed to green?

17 A. It did not move.

18 Q. Can you estimate approximately how long it
19 didn't move at the green light?

20 A. I estimated 30 seconds.

21 Q. Did the vehicle then go through the light?

22 A. Yes, it did.

23 Q. What action then did you take?

24 A. I stopped the vehicle. Got behind it and
25 called on the radio that I would be stopping the

(WILLIAMS - Cross by Dyer)

1 violation before?

2 A. Yes, I have.

3 Q. Okay. Based on your observation of the
4 defendant waiting at that light, did you believe that he
5 may have been impaired by the time -- based on
6 the time that he took to go through the light?

7 A. Yes, I did.

8 Q. Nothing further of the witness, your Honor.

9

10 CROSS EXAMINATION

11 BY MR. DYER:

12 Q. Officer, is it your testimony then, as I
13 understand it, that the basis for your investigation was
14 the length of time that the vehicle was stopped at the
15 intersection; is that correct?

16 A. That's what initiated the investigation,
17 that's not the basis of the rest of the investigation.

18 Q. Okay, I'm with you. But that's the -- that
19 is the basis upon which you decided to stop
20 Mr. McCullough's vehicle, correct? There was -- you
21 didn't base it on any sort of a driving pattern or any
22 other conduct that you observed?

23 A. No.

24 Q. Okay. And also is your testimony, if I'm not
25 correct, that you said it is a violation of law to not

(WILLIAMS - Cross by Dyer)

1 would be with unlawful conduct; is that not true?

2 A. You mean lawful conduct --

3 Q. Yes.

4 A. -- as unlawful conduct?

5 Q. Correct.

6 A. Yes.

7 Q. Did the fact -- by the way, what time of day
8 did this occur?

9 A. It was around 10 to 1.

10 Q. Okay. So it was just after midnight then?

11 A. Right, 50 minutes after.

12 Q. Did that impact on your decision?

13 A. It may have, I don't recall for sure.

14 Q. So the only facts that impacted on your
15 decision to pull the vehicle over was the fact of the 30
16 second delay in proceeding through the intersection?

17 A. Yeah.

18 Q. Okay, and once that vehicle had proceeded
19 through at that point in time, you made the decision
20 based on the information you had that you felt there was
21 sufficient basis to pull the vehicle over?

22 A. Correct.

23 Q. After the vehicle was pulled over and you
24 contacted the driver, were any field sobriety tests
25 performed?

(WILLIAMS - Cross by Dyer)

1 A. I demonstrated one. He declined to do it on
2 the basis that he was too drunk to pass it.

3 MR. DYER: Your Honor, I would move to strike
4 the response as being nonresponsive.

5 MR. COOK: Appears --

6 MR. DYER: The question called for a yes or no
7 answer.

8 MR. COOK: Appeared to be responsive to us,
9 your Honor.

10 THE COURT: I sustain.

11 Q. And based on your observations of the 30
12 second stop at the intersection, and the smell of
13 alcohol on the individual's person and his appearance,
14 that was your probable cause for arrest; is that
15 correct?

16 A. No.

17 Q. What additional facts did you have to give
18 rise to probable cause for arrest?

19 A. The fact that he pulled to the curb okay, and
20 I was approximately a car length behind him; I stopped
21 my vehicle and was on my way out of my vehicle to
22 approach his when his vehicle, in reverse, started
23 towards my vehicle.

24 Without stopping the vehicle which was rolling
25 towards my vehicle, he put it in park. And you could

(WILLIAMS - Redirect by Cook)

1 see the, you know, the instantaneous stop when he
2 dropped from reverse into park.

3 Q. Is that particular driving conduct consistent
4 with a transmission problem?

5 A. I don't know, I've never had a transmission
6 problem like that before.

7 Q. Is it possible it could be consistent with a
8 transmission that won't --

9 A. Well --

10 Q. -- go into gear?

11 A. I imagine it could be possible.

12 MR. DYER: That's all I have, your Honor.
13

14 REDIRECT EXAMINATION

15 BY MR. COOK:

16 Q. To be clear, officer, you considered a number
17 of factors before you placed the defendant under arrest;
18 is that correct?

19 A. That is correct.

20 Q. You mentioned previously slurred speech?

21 A. Yes.

22 Q. Poor balance?

23 A. Yes.

24 Q. Odor of alcohol?

25 A. Yes.